law. The one cannot, therefore, be universally cited as authenticating or justifying the other.

The Attorney-general, interrupting the reply, asked leave to read the following passage from Balfour's Practics (p. 239, s. 9), in order to show that at the time of the publication of that work, the doctrine of legitimation by subsequent marriage was well known in Scotland, and the mode of proceeding in the Courts settled: **[840]** "If any children be begotten and born between ane man and ane woman, not being at that time joined in the bands of marriage, and thereafter it shall happen that the same man shall lawfully marry the same woman, the bairns begotten and born before the completion of the same marriage are made lawful, and may sue as right heirs to their parents. And if any controvert or question whether they were begotten or born before the completion of the said marriage, the same shall discussed be before the Spiritual Judge, as is immediately before said of bastardy."

Sir F. Pollock continued:—That quotation proves the previous assertion. The law was introduced by the Spiritual Judges. It must of course be taken, on Balfour's authority, that such was deemed to be the law at that time. That was in the time of Queen Mary, who had directed this law to be administered by the bishops. Still it is curious that it is not found in the subsequent authority of Lord Stair. The question of domicile is as little known in the Scotch as in the English law: in both it has only been recently introduced, and introduced for certain purposes. It has not been borrowed from the civil law: it could not exist there, for the universality of the Roman empire prevented such a doctrine from being of any importance. The argument respecting allegiance has not been fairly met. It was put on the supposition of a case like this arising before the union of the two Crowns. In such a case it is clear that birth here would constitute the child an English subject, and his status would in all respects be settled by the English law. In *Rose* v. *Ross*, Lord Lyndhurst said, "It is sufficient that the child should have been born in a country in which illegitimacy is indelible; **[841]** no subsequent marriage could render him legitimate." If that principle should not be adopted, if any rule to ascertain the status of a person should be allowed besides the intelligible rule of the place of his birth, the greatest confusion will be introduced into the law, and every case will be made to depend on the doubtful issue of various and conflicting laws.

Judgment postponed.*

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[842] MARY SEYMOUR MUNRO,—*Appellant;* GEORGE MUNRO, and CHARLES MUNRO his Son,—*Respondents* † [March 17, 19, 23, 24, 26, 30; August 10, 1840].

[Mews' Dig. vii. 664; viii. 231; S.C. 1 Robin. 492. See cases cited under last preceding case, and also *Harvey* v. *Farnie*, 1880, 5 P.D. 161; *In re Patience*, 1885, 29 Ch.D. 983; *In re Grove*, 1888, 40 Ch.D. 224, and Westlake *Priv. Int. Law*, 3rd ed. 90.]

A Scotch gentleman of rank and fortune left Scotland in 1794, and came on a visit to London. In the course of that year he became acquainted with an English lady. In 1795 he took lodgings for her in London, where, in 1796, a child, the fruit of their intercourse, was born. He then took a house on lease and furnished it, and continued to reside in that house with her till 1801, unmarried. In September of that year he married her in an English church. In 1802 he returned to Scotland, taking with him his wife and child, and settled himself in his patrimonial mansion. During the whole period of his

* The case immediately following was argued about the same time; and as it involved the same points of law (though the facts in the two cases varied from each other), both were considered and adjudicated upon together. The judgment in both will be found at the conclusion of the arguments in the next case.

† See the head notes to *Dalhousie* v. *M'Douall*, *ante*, p. 817.

residence in London he had been accustomed to write letters to Scotland, declaring from time to time his immediate intention to return, and desiring things to be done which could only be necessary on that account.—Held, that he had not lost his Scotch domicile, and therefore that his marriage was in all respects a Scotch marriage, and his child capable of succeeding as his lawful heir to entailed estates.

This was an action of declarator of legitimacy, brought by the Appellant for the purpose of establishing that she was the lawful daughter of Sir Hugh Munro, of Fowlis, bart., and as such the heiress of entail entitled to succeed to the estates of Fowlis. Sir Hugh held those estates under an entail to him and the heirs male, and failing heirs male, then to the heirs female of his body. The Respondents, in the event of failure of heirs of the body of Sir Hugh, would succeed to the estates. Sir Hugh Munro succeeded on the death of his father, in 1781, to the estates at Fowlis, and to the dignity of a baronet, but was then under age: he attained his full age in 1784. He took an active share in the management **[843]** of his own estates, and was frequently an attendant at the sittings of the town council of Fortrose, to which he was admitted a member soon after becoming of age. In 1785, 1787, and 1788, he visited the Continent, but always returned to Scotland, where he resided, not at the family mansion, Fowlis Castle, but at Ardullie, a house belonging to his mother. He resided with her till 1794, when, in consequence of some differences with her, he left Scotland professedly on a short visit to London. In November of that year he became acquainted with a Miss Mary Law in London, and an attachment arose between them. In October 1795, her pregnancy being declared, he took apartments for her in Balsover-street, Oxford-street, where, on the 14th of May 1796, the Appellant was born. He afterwards took a house on lease in Gloucester-place, Portman-square, where he and Miss Law resided together till 1801. In September of that year he married her at the parish church of St. Mary-le-bonne, according to the form of the ritual of the church of England. He continued to reside in London for some months after his marriage, but then broke up his establishment in Gloucester-place and went to Scotland, and there introduced his wife and daughter to his friends and connexions. In August 1803, Lady Munro and two female attendants were drowned while bathing on the shore near Fowlis Castle. As some rumours had been raised of the legal incapacity of Miss Munro to succeed as heiress to the entailed estates, the suit for declarator was brought to determine that question. The conclusion of the summons was, that "it should be found and declared that the pursuer, the said Miss Mary Seymour Munro, as lawful daughter, and at present only lawful child, of the said Sir Hugh Munro, is entitled, **[844]** failing her said father and heirs male of his body, to succeed to the estate of Fowlis and others, in virtue of the clause of destination and other clauses in the entail aforesaid; and that she has a vested interest therein, and *jus crediti* over the same, as heir female procreate of the body of Sir Hugh Munro." The Lord Ordinary (Corehouse) reported the case to the Lords of the First Division of the Court of Session, by whom the other Judges were consulted. In this, as in the preceding case, the Lord President thought that the domicile of the father had nothing to do with fixing the status of the child; but he was also of opinion, that if it had, then the domicile was altogether English, and therefore the child was indelibly impressed by the law of England with illegitimacy. Six of the other Judges thought the child legitimated by the subsequent marriage, on the ground that the domicile of the father was Scotch; six others thought the domicile was English, and therefore that the Appellant was illegitimate. In accordance with the opinion of the majority of the Judges, a decree was pronounced relieving the defenders (the Respondents) from the conclusions of the libel. This was the decree now appealed from.

Mr. Pemberton, for the Appellant:—The arguments here will be confined as much as possible to those points in which this case differs from that of *Dalhousie* v. *M'Douall*, and to those which the discussion in that case has suggested. The first distinction between the two cases is to be found in the conclusion of the summons, which in the present case does not seek for a declarator as to the status of the Appellant, but, according to the terms of the entail, prays that she may be declared entitled, as *persona designata*, **[845]** as immediate heir in succession after the death of Sir Hugh, to the estate of Fowlis. If by the Scotch law the Appellant is the heir of Sir Hugh

Munro, she is entitled to have the judgment of the Court below reversed, and the declarator directed to be in her favour. The question of the domicile of Sir Hugh Munro, at the time of the birth of the Appellant and at the time of his marriage, is most important. All the circumstances here show it to have been a Scotch domicile. Six of the Judges were of opinion that it was an English, six that it was a Scotch domicile; but all twelve agreed, that if the domicile was English, Miss Munro was not entitled; if it was Scotch, she was entitled to the declarator prayed for. The thirteenth Judge, the Lord President, was of opinion that domicile had nothing to do with the matter, which must be decided by the place of the birth of the child, and that that being English, the status of illegitimacy had indelibly attached itself to her. This case therefore is unprejudiced by anything which has occurred in the Court below; and if this House should be of opinion that the domicile was Scotch, the course will be to affirm the judgment of the twelve Judges who thought that that would of itself entitle the Appellant to the declarator which she sought to obtain. It may now be assumed, for the purposes of this argument, that the place of the marriage is immaterial. The foundation of this Appellant's title is the domicile of Sir Hugh Munro, her father. If that is Scotch she is entitled to what she asks. The principle is laid down very clearly in the case of *Somerville* v. *Somerville* (5 Ves. 750), where it was held that the mere place of birth or death does not constitute the domicile, the **[846]** domicile of origin, which arises from birth and connexions, remaining until clearly abandoned and another taken. The Master of the Rolls there said (5 Ves. 787), "The third rule I shall extract is this, that the original domicile, or as it is called, the *forum originis*, or domicile of origin, is to prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile and taking another as his sole domicile." In England, the domicile of a family follows that of the father; his domicile is that of his family. We propose here to show by the evidence that Sir Hugh was clearly by domicile of origin Scotch; that he retained that without interruption or doubt until 1794; that when he left Scotland in that year he did so with no intention of abandoning his Scotch domicile, but merely to pay a visit, as any other gentleman might do, to another country, and to return at the end of his visit; that though he remained in England from 1794 to 1802, he had never any intention of abandoning his Scotch domicile, but looked on himself and required others to look upon him as a person who was temporarily absent from his home, but who, though constantly prevented from executing his intention, had the most settled intention of speedily returning to it. On attaining his full age in 1784, the first thing he did was to make use of his newly-acquired power, in order to sever the only tie he had with England. He had succeeded to the estate of Woodlands in Dorsetshire; his father got that estate through Sir Hugh's grandmother. His father died indebted. The Scotch estates were equally liable with the English estates to the payment of those debts; **[847]** but the first thing he did was to sell the English estates for the payment of those debts. That was a strong indication of intention, and the more so as the estates sold for £30,000, being considerably more than the amount that was necessary for the purpose of the payment, and the surplus of the money thus obtained he invested in property in Scotland.—[The learned counsel here went through a series of letters written by Sir Hugh when on his travels before he was of age, upon his attaining twenty-one, and while residing in London after 1794, with the view of showing that he had always considered Scotland as his home, and that when staying away from Fowlis he was perpetually writing to say that in a few days he should return, and directing alterations in his house and in the arrangements of his family, which could only be needed on account of the presence of the master.]—On the law as applied to these facts there can be no doubt. Sir Hugh had a domicile of origin which he never lost. Such a domicile can only be lost in consequence of a clear intention to abandon it. An absence, however long, if not accompanied by such an intention, can have no such effect. To acquire a new domicile there must be both residence and intention; to retain it, intention alone is sufficient. This may clearly be taken as the result of Sir J. Leach's opinion in *Munroe v. Douglas* (5 Mad. 405); and it was also the opinion of Sir John Nicholl in *Curling* v. *Thornton* (2 Add. Ec. 6 *et seq.*). According to Pothier (Coutumes d'Orleans, Introd. Gen. c. 1, s. 7), the original domicile must prevail if it be even doubtful where the domicile is: and Denisart (Tit. Domicil, vol. 1, p. 514, pl. 12, 13) is of the same

opinion. All the authorities are collected by Mr. Burge (Commentaries on Colonial and Foreign Law, vol. 1, p. 41), and the result of them seems to be, that [848] domicile is acquired, as expressed by Pothier (intr. Gen au Cout. p. 4), " par le concours de la volonté et du fait;" that having been once acquired, it may be retained by intention, without actual residence; that residence alone, however long, will not acquire it; but that, however short that residence, domicile may be acquired if the intention to acquire it is clearly manifested. All these positions were fully shown in Van Leuwen's case (Respons. Juris. Holt, pt. 5, cons. 85), referred to by Mr. Burge (Comm. C. and F. Laws, vol. 1, p. 42). He was a citizen of Utrecht, who resided for ten years, from his fourteenth to his twenty-fourth year of age, in Spain, whither he had been sent to trade, but he did nothing to show an intention of acquiring a domicile there. On his return he took a room in Utrecht, and performed certain things required by the custom there to constitute citizenship; but he did not permanently live there, and he died intestate in Amsterdam. It was held that his property must be distributed according to the laws of Utrecht, in which he was to be considered as domiciled at the time of his death. On the same principle, a marriage celebrated at Smyrna between a Dutchman, who held the office of Dutch consul there, and resided at that place for a great many years, was held to be regulated in its consequences by the law of Amsterdam, his residence at Smyrna not having put an end to his domicile of origin (Niew Nederlands Advys Boek, vol. 1, p. 165; Appendix to Henry's Report of *Odwyn* v. *Forbes*). The case of Madame Justina Gunterroth (Carpzovius, bk. 6. tit. 4, resp. 38; Burge, vol. 1, p. 50) was decided on the same ground that residence of any length would not acquire a domicile *nisi voluntas et animus accesserit.* A change of domicile is not easily to be presumed, says Voet (Bk. 5, l. 99); and [849] the same author there expresses in the clearest manner what will constitute a domicile. " Illud certum est neque solo animo, neque destinatione patris familias, aut contestatione sola, sine re et factae domicilium constitui: neque sola domus comparatione in aliqua regione, neque sola habitatione sine proposito illic perpetuo morandi." And the general definition of a domicile is given by the same author as the place where a man " larem rerumque ac fortunarum suarum summam constituit: " a definition at once the most expressive and the most exact, and one which has ever since been recognised as authoritative by all the tribunals of the world. Vattel (Bk. 1, c. 19, par. 217) has expressly adopted it. If these authorities establish, as it is submitted they do, that the mere leaving home for however long a period will not, without the intention to change the domicile, have that effect, then it is submitted that Sir Hugh's residence in England did not affect his domicile, but that it all the while continued to be Scotch. The evidence in this case does not justify, it contradicts, the assumption of any such intention. Then what is the effect of the domicile on the question of legitimacy? It is an admitted principle that a Scotch marriage will legitimate previously born children. What is to prevent the application of that principle in the present case? certainly not any loss of Scotch character by a change of domicile. The authorities already quoted abundantly show that there has been no change of domicile in this case. But then it will be said that the marriage was contracted in England, and consequently cannot have the effect of a Scotch marriage; then that the mother was at the time of the birth domiciled in England, and that [850] the child, being then illegitimate, must follow the domicile of the mother; and lastly, that the birth took place in England, and consequently that the status of illegitimacy was thereby indelibly impressed on the child. But the great answer to all these arguments is, that the husband was a domiciled Scotchman; that the marriage was therefore a Scotch marriage, and being so, that all the incidents of a Scotch marriage attached upon it. One of the great incidents of such a marriage is to legitimatise children by having relation to a period antecedent to the birth, so that the marriage is considered to have taken place (there being no lawful impediment to the marriage) before the birth of the child. The rule is, " Retrotrahitur ad tempus nativitatis liberorum, ut sic taliter legitimati, ab initio legitime nati censeantur " (Cod. de Nat. lib. 5, tit. 27, l. 10). In that rule no restriction exists as to the place of the birth or the domicile of the mother. The only qualification which this rule of law admits of, is that of a previous impediment so well known in the law of Scotland, but which need not be considered here because no one pretends that it existed. The effect of this *subsequens matrimonium* in legitimatising the children is so great that a grandson

will have the benefit of the legitimacy of his father, conferred by the marriage of the grandfather and grandmother even after the father's death. That was a principle of the civil law (Voet, lib. 25, tit. 7, de Concub. n. 7), and the law of Scotland has adopted that principle to its fullest extent (Balfour's Practics, tit. Bastard, folio edit. p. 239); Craig says (Bk. 2, Dig. 13, s. 16), "Legitimatos vocamus, qui in concubinatu nati, justis nuptiis inter utrumque parentem postea sequentibus; et jure, hi **[851]** legitimi censentur: * * * tanta enim vis est matrimonii subsequentis, ut de priori delicto inquiri non sinat, et illud omnino tollat, et purget." Several other eminent Scotch law writers adopt this opinion (Bankton, b. 1, tit. 5; Ersk. b. 1, tit. 16; Spottisw. Bastardy, p. 27). The exceptions to this otherwise universal rule arise out of incest and adultery. Such being the law of Scotland, it is binding on all Scottish subjects, and conclusive as to their rights. The respect which is due to the principles of the Scotch law, however they may be opposed to English notions of law, has been clearly asserted in this House in the case of *Birtwhistle* v. *Vardill* (*ante*, vol. II. p. 593): "It is not more alien to the English law to adopt the fiction that such children are born in wedlock, than it is alien to the Scotch law to exclude that principle. The English rule being statutory can make no difference. A fixed and known principle of common law has exactly the same force as a statutory provision." But then it will be said that the fact of the marriage having taken place in England makes a great difference in this case. It is not denied that there are some *dicta* to be found in the cases of *Shedden* v. *Patrick* (Dict. Dec. "Foreign," App. n. 6, 1 July 1803), and *Strathmore* v. *Bowes* (4 Wils. and Shaw, App. 89, n. 5), and *Ross* v. *Rose* (4 Wils. and Shaw, 289; Fac. Coll. 15 May 1827), which do seem to render that matter of importance. But they are merely *dicta*. And after the case of *Warrender* v. *Warrender* (*ante*, Vol. II. p. 488), it cannot now be doubted that the right to inquire into alleged adultery with a view to dissolve a marriage had in England, the lady being an English lady, is possessed by the Courts of the country in which the husband's domicile is, and where **[852]** the contract of marriage was intended to be performed. It was so decided on the ground that, in contracting a marriage, the wife acquires the domicile of the husband. Domicile in all these cases rules other considerations. There is no one decision that depends on the mere place of the marriage or that of the birth. In the cases of *Conty du Quesnois* (Guessiere, Journ. des Princ. Aud des Parl. tom. 2, b. 7, c. 7; Burge Comm. Col. and For. Laws, 106), *Shedden* v. *Patrick* (Dict. Dec. "Foreign" App. n. 6, 1 July 1803), *Strathmore* v. *Bowes* (4 Wils. and Sh. App. 89, n. 5), *Rose* v. *Ross* (4 Wils. and Shaw, 289), and in *Warrender* v. *Warrender*, where all the previous cases were considered, everything was made to depend on the question of domicile.

There is no such thing as the indelibility of illegitimacy: not even in England does that indelibility exist. It may, for instance, be at once removed by an Act of Parliament. It cannot, therefore, be indelible, since an Act of Parliament may make a bastard legitimate in England, as a subsequent marriage will make him legitimate in Scotland. Nor is there any valid argument to be drawn from the supposed doctrine of allegiance: for taking the statements in the books as to allegiance to be conclusive, still it is clear that the distinction between allegiance and domicile is very great. The first can never be put off; the other can be put off and resumed at pleasure: the first depends on a principle of state policy, which is unalterable; the next depends on the sole exercise of the will of the individual. The rule of domicile must govern this case, and it must most especially do so since the subject-matter of the litigation is the title to real property, which depends entirely on the *lex rei sitae*. The municipal law of Scotland is therefore that which **[853]** can alone be applied to the case; and the Appellant being fully brought within the operation of that law, she is entitled to be declared the lawful heir of entail.

Sir W. Follett, on the same side:—It is true that the word domicile has not been found in any of the writers on English law; but that does not show that English law would not admit the doctrine of domicile and its consequences, when properly presented as a subject of adjudication, but merely that our law writers have hitherto confined themselves to the municipal law of their own Courts. *Munro* v. *Sandhurst* (6 Bli. 478) may be added to the cases already cited as decided on the question of the domicile of the party. Boullenois (Tom. 2, tit. 2, c. 1, obs. 22, p. 10), after observing that, where the laws of a kingdom allow a bastard to be legitimated by a subsequent

marriage, as in France, his legitimacy thus lawfully acquired in his own country must be recognised by all other nations; or if the law of his own country does not allow of this legitimation, as in England, his continued illegitimacy must in like manner be recognised; proceeds to say, " J'applique encore cette decision à un enfant Anglois, né en Angleterre d'un concubinage, et dont le père et la mère seroient venus demeurer en France, et y auroient maries sans s'y être faites naturaliser, parceque étant veritablement étrangers, et comme tels soumis aux lois d'Angleterre, leur enfant ne peut pas être, suivant ces loix, batard en Angleterre de naissance, et être regardé comme legitimé en France parcequ'il porte partout l'état et la condition dont il est par les loix de sa nation." And this opinion has been completely adopted by Merlin (Tit. Legitim, sect. 2, para. 11, p. 865). In this passage it is **[854]** clear that *naturaliser* may be taken as synonimous with domiciled; the condition of the parties at the time of the marriage, and not the mere locality of the marriage, being that which is to govern the case. And to show this the more strongly, he adds, that the naturalisation must be before and not after the marriage, for otherwise it will produce no such effect. That the place of the marriage cannot affect the question, but that the domicile of the parties must decide, is manifest. Try it by this test:—An Act exists in this country to declare the marriage of a man with his deceased wife's sister void. Suppose, after the passing of that Act, two such persons were to go to France for the purpose of being married, such a marriage not being forbidden in France, and should there marry and a child should be born, by the law of France that marriage would be legal and that child legitimate. Would the child be legitimate in England? By the law of this country the disability is permanent, and the marriage would have no effect. In this country, therefore, it is clear that the child would be illegitimate; and it would be so because the parties marrying were domiciled in England, and the marriage (except for the mere question of the due observance of the forms required by the law of France) would therefore be an English marriage. The solution of these questions, if referred to domicile, is plain and easy; if put on any other ground it would be most confused and difficult. On the ground of domicile, 12 out of 13 Judges have decided that this Appellant is entitled, if in fact her father was domiciled in Scotland. It is that question as to where he was domiciled that alone created doubts in their minds. The other important question then is, as to the fact of the domicile. That domicile was **[855]** Scotch. It was not changed by the residence in this country of Sir Hugh Munro. That was his domicile by birth, and all the authorities show that that is to be presumed to continue till the contrary is shown. Denisart and Pothier (Denisart, tit. Dom. s. 11; Pothier, Cout. D'Orleans, c. 1, s. 7) lay down this principle, and Mr. Burge (1 Com. Col. and For. Laws, 40) cites a number of other authorities, all in support of this proposition. *Warrender* v. *Warrender* (*ante*, Vol. II. p. 488) is the strongest case which can be imagined in support of this doctrine of domicile. There the marriage took place in England, the lady was an English lady, the husband resided for years in England and was Member of Parliament for an English borough, and yet his domicile of origin was held not to have been lost, and in virtue of that domicile the Scotch Courts were held by this House entitled to inquire into a cause alleged for the dissolution of the marriage. The English authorities, agreeing with foreign writers, show that the question of domicile depends on the mind of the person. In *Stanley* v. *Bernes* (3 Hagg. Ecc. Rep. 437), Sir J. Nicholl declared that there must be a residence *sine animo revertendi*, in order to change the domicile of origin. How strong must be the circumstances establishing that animus may be seen in that case. There the party had left this country and resided in Portugal for 56 years; he renounced his religion and became a Roman-catholic; he married and had a son in Lisbon; he asked for admission to Portuguese allegiance, and got it, and was treated by the French in 1808 as a natural-born subject: yet even in his case it was doubted whether he had done that which showed a determination to change his domicile of origin. The same principle **[856]** was adopted in what is called the Annandale case, *Bempde* v. *Johnson* (3 Ves. 198); and all these cases, with many others, were referred to in *Somerville* v. *Somerville* (5 Ves. 750), which was itself founded on the previous decisions in this House of *Ommaney* v. *Bingham* (6 Bro. P. C. 560), and *Bruce* v. *Bruce* (*id.* 566; and 2 Bos. and P. 229 n.), and that case was followed by *Curling* v. *Thornton* (2 Add. Ecc. Rep. 6); so that it is difficult to conceive a more continuous course of decisions

establishing any one point of doctrine. It may therefore be assumed that every presumption is to be made in favour of the domicile of origin. Secondly, that no change of it can occur without an actual residence in a new place, and an intention to fix a residence permanently there: and thirdly, that no new domicile can be acquired without a clear intention of abandoning the old. These two last propositions completing the doctrine of change *animo et facto*. Now it cannot be pretended that any one of these circumstances exists here. If this was the case of a Scotchman in ordinary circumstances in life, without any property, or anything at all beyond the mere circumstances of parentage and birth to connect him with the country, there would not be sufficient to show that there had been any change in his domicile: but when it is recollected that he was a gentleman of fortune and rank; that his fortune was in Scotland, that his rank was altogether Scotch, that even his personal property was in Scotland, and that his money was in a Scotch bank; that all his connexions were in that country; that his *domus mansionalis* was there, and that from time to time, almost from day to day, during his continuing here, he was directing alterations with regard to that **[857]** mansion, and fitting it for his permanent residence, —no one can doubt that his domicile of origin remained; and that there existed neither the fact of his having a settled residence in this country, nor his intention to have one, and to abandon the land of his birth. Under these circumstances, the law to be administered in the case is Scotch; and by that law it is clear that his marriage was a Scotch marriage, and that his daughter is the lawful heir to his entailed estate.

Mr. Knight Bruce, for the Respondent:—Fortunately there is no dispute as to the facts of this case, so far as the marriage and the birth of the Appellant are concerned. The domicile of the mother is not in question, so that as far as that is concerned the domicile of the child at the time of birth was English. With these facts settled beyond dispute the question is, whether this case is distinguishable from those of *Sheddon* v. *Patrick* (Dict. Dec. "Foreign," App. n. 6, 1 July 1803), *Strathmore* v. *Bowes* (4 Wils. and Sh. App. 89, n. 5), and *Rose* v. *Ross* (4 Wils. and Sh. 289; Fac. Coll. 15 May 1827). These three cases were all decided in this House, and are therefore binding authority not only on the Courts below, but on this House itself. The case of *Rose* v. *Ross* is very strong in favour of the Respondent. The man there was a native of Scotland. He had a child born to him in England; it was illegitimate; he brought the mother of the child to his own country, Scotland; he stayed there 15 days before he married her, he then had a lawful marriage celebrated; he remained in Scotland some time after the marriage, and then returned to England. This House, sitting as a Scotch Court of Appeal, decided that the child of parents who were thus married, **[858]** though married in Scotland, could not succeed to Scotch landed estate. If that case cannot be distinguished from the present, there is an end of the Appellant's argument. But it is said to be distinguishable on the ground that the marriage in *Rose* v. *Ross* was English, but that the marriage in this case, though actually taking place in England, was in law a Scotch marriage. On what is that argument based? On the assertion that at the time of the marriage Sir Hugh Munro was in law, though not in fact, domiciled in Scotland. This assertion cannot be supported. The domicile of origin of Sir Hugh Munro is not denied; but he had lost it by a long residence on the Continent and in England.—[He referred at considerable length to the evidence and to the letters written by Sir Hugh Munro while in England.]—If, therefore, domicile was to govern this case, the domicile was English, and not Scotch. But the mere fact of a man's domicile has alone no effect on a case like the present. Connected with other things it becomes of importance; and when it is found that here Sir Hugh Munro passed the greater part of his life absent from Scotland, it is clear that the inferences sought to be drawn from expressions in his letters are much overcharged, if indeed they are at all justified. It may not be improper, with regard to those inferences, to remark that if some of the expressions in the letters indicate an intention to return to Scotland (an intention that, however frequently expressed, was left for years without even an attempt to carry it into execution), there are others which speak of the journey to Scotland as he might have spoken of a journey in the summer to Brighton or to Cheltenham. Thus, for instance, in one he deliberately speaks of the discomforts of "a tour" in Scotland, and in another he says **[859]** that he shall make "a jaunt" thither. These expressions indicate a feeling that his home was elsewhere than in Scotland, and

they are the more important since they are in accordance with his conduct; while those relied on by the other side are altogether opposed to it. It is likewise to be remarked that up to the period of his marriage, though he was frequently writing to Scotland, he had not a house fit to receive him there. That circumstance, if intention is to be relied on, is a strong indication of intention, and in a very marked manner distinguishes this case from that of *Warrender* v. *Warrender* (*ante*, Vol. II. p. 488), where the husband not only had a mansion in Scotland befitting his rank and fortune, but frequently went thither, taking his wife and family with him, in the intervals of public business. The letters of Sir Hugh, so much relied on, are the ordinary letters of a careful man of business, who was fond of giving the most particular directions to his agents, and not unfrequently stimulating their attentiveness by the declaration that he was coming down to see the progress of the matters which were the subjects of his directions. The same conduct is pursued by Englishmen who have large estates in Ireland which they never visit in the course of their lives, but about which they are incessantly writing directions and orders to their agents. No one would affect to say that the fact of their possession of property in Ireland makes them domiciled Irishmen. If intention is to be taken as fixing domicile, then it must be admitted that conduct is the best evidence of the existence of intention; and tried by that test, it is clear that the intention of Sir Hugh, up to the time of his marriage, was to live in England as an Englishman. Every time he declared that he should go to **[860]** Scotland, and yet delayed carrying that intention into effect, he gave by the very declaration and the delay to execute it a fresh proof of his preference of an English residence. The reason for his keeping a Scotch banker is shown in one of his letters, in which he uses these words: "Procure me a £500 credit on that one of the Scotch banks which shall appear to you most liberal in dealing." He was a sharp man of business, and dealt with the Scotch banks because he thought his doing so was to his own advantage.—[The learned counsel again referred to the letters.]—What is the result of all these letters? They show, combined with the conduct of Sir Hugh, an intention to remain and be settled in England. The cases, then, of *Somerville* v. *Somerville*, *Bempde* v. *Johnson*, *Balfour* v. *Scott*, and *Bruce* v. *Bruce*, do not apply for the purpose for which they were cited for the Appellant: but they do apply for the Respondent, and *Balfour* v. *Scott* (6 Bro. P. C. 550) is strongly in point here. That was a case of a Scotchman, a great landed proprietor, who like Sir Hugh Munro had dismantled his house, and had lived for years in London; and there, though exactly the same arguments which have been used here were applicable, and were applied to his case, he was held to be domiciled in England. In *Curling* v. *Thornton* (2 Addam, Ec. Rep. 6) the question of domicile never was decided. The decision there merely was as to the sufficiency of a responsive allegation, and the *dicta* thrown out, however entitled to respect, have no authority, since they did not amount to a judicial decision. The decision in fact amounted only to a recognition and application of that principle which the supreme legal authority in **[861]** this country had clearly laid down, that an Englishman is not entitled, by acquiring a foreign domicile, so far to throw off his country as to dispose of his English property by a will otherwise than in the English form; and that the Courts here cannot reject a will made by an Englishman in the English form, merely because it is made in a foreign country. The principle really deducible from that case is in favour of the Respondent; for it amounts to this, that wherever an Englishman is domiciled, his will must be dealt with as the will of an Englishman. The same learned Judge, in *Stanley* v. *Bernes* (3 Hag. Ecc. Rep. 447), upon exactly the same principle, gave effect to two codicils made in Portugal by an Englishman, good in their form and attestation, according to the English law, though bad according to the Portuguese law, and though it was there admitted that the testator had in fact resided for years in Portugal.* These cases show that domicile has not the force attributed to it by the Appellant. In *Bruce* v. *Bruce* (6 Bro. P. C. 566; 2 Bos. and

* But this decision was reversed by the Delegates, 3 Hag. 465. These two codicils had been made with a view to pass English property. The testator had executed a will and codicils in the Portuguese form, to dispose of his Portuguese property. Unfortunately, the reasons of the delegates are not given, and the manner in which the case was viewed by them does not appear.

Pul. 229 n.), an Englishman went to India, with the intention of returning here; but as he had only an indefinite hope of returning, that did not affect the question of domicile. Lord Thurlow there said (2 B. and P. 230 n.), "The true ground on which the case turned was the deceased being domiciled in India. He was born in Scotland, but he had no property there. A person's origin, in a question of 'where is his domicile?' is to be [862] reckoned but as one circumstance in evidence, which may aid other circumstances: but it is an enormous proposition that a person is to be held domiciled where he drew his first breath, without adding something more unequivocal. A person's being at a place is *primâ facie* evidence that he is domiciled at that place; and it lies on those who say otherwise to rebut that evidence." This question of domicile came especially under the consideration of Sir W. Scott, in the case of the Harmony, and there that learned Judge made the following most important remarks (2 Rob. Adm. Rep. 324):—"Of the few principles that can be laid down generally, I may venture to hold that time is the grand ingredient in constituting domicile. I think that hardly enough is attributed to its effects: in most cases it is unavoidably conclusive. It is not unfrequently said, that if a person comes only for a special purpose, that shall not fix a domicile. This is not to be taken in an unqualified latitude, and without some respect had to the time which such a purpose may or shall occupy: for if such a purpose be of a nature that may probably or does actually detain the person for a great length of time, I cannot but think that a general residence might grow upon the special purpose." The texts of the civil law on the question of domicile have already been cited. Their effect has been well given by Domat (IV. 424): "Le principal domicil de chacun est celui qu'il a dans le lieu où il tient le siége et le centre de ses affaires, où il a ses papiers, qu'il ne quitte que pour quelque cause particulier, d'où, quand il est absent, on dit qu'il est en voyage, où, quand on revient, on dit qu'il est de retour, où il passe les principales fêtes de l'année, où il porte les charges, et où il jouit les privileges de ceux qui en [863] sont habitans;" and he adds, "Il est egal pour ce qui regarde le domicile d'une personne qu'elle reside ou fasse sa demeure dans sa maison propre, ou dans la maison d'une autre tenue a loyer ou a aucun autre titre. Et par cette même raison, que la residence fait le domicile, celui qui a une maison en propre dans un lieu où il ne reside pas, n'y est pas pour cela domicilié." And the Code Napoleon (Code Civil, ss. 102, 103) says, "Le domicile de tout Français, quant a l'exercice de ses droits civils, est au lieu où il a son principal etablissement;" and that the change of domicile shall be effected by the fact of adopting a real habitation in another place. The "Larem ac fortunarum suarum summam" is in this case to be found only in London, which here answers the description given by Domat and by the Code Napoleon of that "real habitation" which constitutes a domicile. So that, even taking the rule from the other side, that the contract must be governed in its consequences by the law of the place where the spouses intend to reside, as laid down in *Warrender* v. *Warrender* (*ante*, Vol. II. p. 488), it is clear that London was that place, for there is not in the evidence in this case anything to show that at the time of the marriage there was any intention to perform the contract in Scotland. The marriage took place in September 1801, in an English parish church. On the 21st of October 1800, Sir Hugh had written a letter which showed the possibility of his being prevented from going to Scotland in the course of the next year, and on the 16th December 1801 was written the next letter which had any reference to that subject, and in that he merely says, "It is my resolution, please God, to go early next summer into Scotland. I wish, if possible, to [864] reside at Fowlis while I am in that country, and I hope I shall without difficulty be able to accomplish that wish; but be that as it may, nothing but death or violent sickness shall prevent my affording you an opportunity of seeing me." In the next letter on the same subject, dated in January 1802, he says, "I am anxious during my visit to Ross-shire, which must be very short, to avoid business as much as I can." No one can say that these letters show that intention of possessing a Scotch domicile, which, even by the argument on the other side, is necessary to retain the domicile of origin. On the contrary, all the letters show an intention to make London his "real habitation," the "centre of his affairs," and the spot on which he constituted his "larem ac fortunarum suarum summam." It is a most important circumstance that the house in Gloucester-place was taken by Sir Hugh

on a lease. The Respondent being right as to the fact of the domicile, the law is decided by the cases of *Strathmore* v. *Bowes, Shedden* v. *Patrick,* and *Rose* v. *Ross.*

But even supposing the matrimonial domicile to be Scotland, that would not, under the facts of this case, render the Appellant legitimate. The birth was in this country, and it occurred before marriage. By the law of this country, legitimacy cannot be conferred by a subsequent marriage. The status of the child, which it will not be denied depends on that of the parent, cannot be afterwards changed. The expression that, by the law of England, bastardy is indelible may be correct or not, but it is plain that by that law legitimacy, or the capacity of legitimacy, existing in a person is indelible. That characteristic of the individual must be taken from the law of the place of his birth; and if bastardy is by the law of that [865] place indelible, the status of the individual is indelible. The authorities of Lords Eldon, Redesdale, Lyndhurst, Brougham, and Wynford, all go to show that the place of the marriage and the birth determine the status; and they are all founded upon the judgments of Courts or the authorities of the most recognised text writers. If that is so, then the status here has been so determined. If Merlin (9 vol. Questions de Droit, 174), as it is supposed, really makes the question depend on the acquisition of the right of citizenship, he is in error; for all the authorities show that domicile, such as is acquired by long residence and having the centre of a man's affairs in a particular spot, and nothing else, can be considered as affecting it. Domicile, again, is not decided, as Merlin intimates, by the residence being with or without the *esprit de retour.* It is constituted, as Lord Stowell said, by the permanency of the habitation. But domicile does not decide the question of legitimacy, which depends on other circumstances. After reviewing all the authorities, Lord Brougham, in *Birtwhistle* v. *Vardill* (*Ante,* Vol. II. p. 272), says, speaking of the question of legitimacy, "the whole inclination of a man's mind must be towards that law which prevails where each man is born and where his parents were married, supposing the countries to be one and the same; and if they differ, I should then say the law of the birthplace must prevail." There can be no authority for giving to a child born out of Scotland the benefit, or imposing on it the liabilities, of the Scotch law: so that, even admitting, for the sake of argument, that the domicile of the father before marriage, and, since marriage, that of the mother of the Appellant is to be treated as Scotch, and the marriage as a Scotch mar-[866]-riage, still it is confidently submitted that, on every authority, the child, having been born in England and born illegitimate, must so remain.

Mr. Fleming, on the same side:—The case divides itself into two parts, the first of which is the question of domicile. It is admitted, that if the domicile is not decided to be Scotch, the Appellant has no right to the declarator now prayed. The second point relates to the status of the Appellant, and amounts to this, can she, under any circumstances, be considered legitimate? The 1st Will. 4, c. 69, gives jurisdiction (S. 33) in these matters to the Court of Session, instead of the Court of the Commissary. Unless the latter Court could before that statute have entered on the consideration of this case, the Court of Session cannot now have any authority to do so. The old authorities are therefore applicable here. The law relating to domicile, as stated by the other side, cannot be supported. Intention is not everything: or if intention is to govern, it must do so when ascertained by the acts, and not by the expressions of the party. The chief authorities declaring what is domicile are the Code Napoleon (Cod. Civ. s. 102, 103), Denisart (Art. Domicile, 513), Pothier (Introd. Gen. c. 1, s. 9), Story (Confl. of Laws, c. 3); and they are all collected in Burge (Com. Col. and For. Law, 40). Vattel (Bk. 1, c. 19, s. 22) has defined domicile to be a fixed residence in any place with an intention of always staying there; but Story (Confl. of Laws, c. 3, s. 43) truly observes, that "it would be more correct to say that that place is properly the domicile of a person in which his habitation is fixed, without any present intention of removing therefrom." Taking all these authorities [867] together, it is impossible to say that the Appellant here can bring herself within their operation. Sir Hugh Munro gave the strongest intimation of his intention as to domicile, by taking a lease of the house in Gloucester-place. His intention is therefore against the Appellant's title. But the mere fact of a long residence in a particular place, without any expression of intention as to domicile, has been declared by Lord Eldon sufficient to induce him to declare that the domicile was in that place. Such were the circum-

stances as stated by his Lordship; *Tovey* v. *Lindsay* (Dow, 133). That doctrine agreed with the opinion of Lord Stowell, in the case of the Harmony (2 Rob. Adm. Rep. 324). Boullenois gave a direct opinion (Tom. 2, tit. 2, c. 1, obs. 22, p. 10) that the status of legitimacy or illegitimacy was one of those states or conditions of people which do not change with the change of domicile: an opinion which is adopted by Mr. Burge in his very learned work (Comm. Col. and For. Law, 105). And Lord Chief Baron Alexander, in delivering the opinion of the Judges in *Birtwhistle* v. *Vardill* (*Ante*, Vol. II. 581), says, "The character of legitimacy or illegitimacy attached to the persons of English or American claimants by their own law, accompanies them everywhere, and would prevent their being received as heirs everywhere within the limits of the Christian world." There can be no partial legitimacy; it must exist everywhere if it exists at all. Now it is impossible to say that the Appellant is legitimate in the Courts of England. If so, she cannot, according to these authorities, be legitimate anywhere. Supposing the domicile of the father and mother at the time of the marriage to have been Scotch, that **[868]** would not affect the question of the legitimacy of the child which had been born in England some years before that marriage. It will be said, however, that to this remark the law of Scotland furnishes an exception, by conferring legitimacy on the children through a marriage of their parents celebrated at any distance of time after their birth. But that proposition, if so stated, is not correct. The subsequent marriage will only confer legitimacy under peculiar circumstances. The parties must be Scotch, the marriage must be Scotch, and there must have existed no impediments to the marriage. It is submitted, too, that a subsequent marriage in Scotland will not confer legitimacy on a child previously born out of Scotland. The doctrine of legitimation by subsequent matrimony has only been the law of Scotland during the last two or three centuries; nor has its operation been admitted in any decided cases except where all the parties have been Scotch, and the events have taken place in Scotland. It is said to have been borrowed from the canon law, but it was at first somewhat doubtfully recognised by the law writers of Scotland; they put it forward, but in general terms. Such was the mode in which Lord Kaines treated it (Bk. 3, s. 8). In ancient times it was certainly unknown. It is not mentioned as a law of Scotland in the *Regiam Magistatem;* and it has not been introduced by the authority of any statute. It exists alone upon comparatively recent custom. And even in modern times, the best writer on the law of Scotland shows that the operation of this peculiar law is not so universal in itself, nor so easily applied, as it is contended to be in this case. Bell, in his "Principles of the Law of Scotland" (3d Edit. p. 444), says, that **[869]** where the domicile of the parents at the birth and the marriage is Scotch, the child is legitimated, but that it does not become so by the parents going to Scotland to marry. This mode of speaking of the parents in the plural number must be taken, in so careful and accurate a writer, as an indication of his opinion that it would not be sufficient if only one of the parents fulfilled these conditions. That would show that the domicile not of one but of both must be Scotch. The Appellant here must contend not that she was legitimated by the marriage, but that she was legitimate from the beginning. But such an argument would at once be fatal to her claim; for at the beginning, namely, from the moment of birth, and for some years afterwards, it is clear that, both in fact and in law, by the law of Scotland as well as England, she was not legitimate; yet to the extent of that argument she must go, in order to bring herself within the Scotch law, for such was distinctly stated to be the Scotch law in the case of *Birtwhistle* v. *Vardill* (per Lord Brougham, *ante*, Vol. II. p. 588): a doctrine most fully borne out by all the principles deducible from preceding cases. From all the authorities it is clear that the status of the person, especially the status of legitimacy, must be judged of by the law of the country where that status originated. The subsequent domicile of the parents cannot affect it. That domicile will not confer on the child the capacity to acquire legitimacy. And when Boullenois and Merlin are quoted to show that a child, bastard in England, may become legitimate in France, the expressions of the latter must be attended to, and they clearly prove that in his opinion such a change could only take place after the naturalisation of both parents and **[870]** child. That word does not mean, as it has been contended, domicile, it means naturalisation in the ordinary sense of that term; an act of the supreme authority of a country, adopting as native-born citizens persons who had

hitherto been foreigners in it. Such an important change may be worked in that country by its supreme authority, but it cannot be the result of the mere act of the parties themselves. In this case all that has been done is the act of the parties, and it has no such force as to change the status which the law of the country where the Appellant was born fixed upon her at the moment of her birth.

Mr. Pemberton, in reply:—The domicile of the father is that of both the spouses. The incidents of the marriage are not governed by the place of the marriage nor of the birth, but by the domicile of the spouses. If there is a conflict of law here, as the matter to be affected is Scotch estate, the Scotch law must govern. The declarator asked is, that the Appellant is, as *persona designata* under an entail, entitled to be declared the heir of Sir Hugh Munro, according to the law of Scotland: it is therefore solely a question to be decided by that law. Domicile must decide this case. Residence is one of the indications of intention as to domicile, but it is not conclusive. Intention is superior to mere length of residence. Here the intention was clear. Never for one moment did Sir Hugh Munro show an intention to abandon his domicile of origin; on the contrary, he always manifested his sense of Scotland being his home, though London was his temporary residence. While in London, he might, in the words of the code, be described as travelling. His fortune, his rank, his habits, all connected him with Scotland; and family **[871]** differences first, and afterwards the attachment he had formed in this country, only persuaded him to delay a return to his native country: but with his agents there he kept up a continual communication, and his Scotch domicile was never lost. His domicile made his marriage a Scotch marriage, and conferred on his child all the benefits of such a contract.

The Lord Chancellor (August 10, 1840):—My Lords, in these cases the first point to be considered is the rule of the law of Scotland, as to the effect of a subsequent marriage of a domiciled Scotsman upon the issue of the parties born before the marriage, when the birth of such issue and the ceremony of marriage took place out of Scotland. Not that all those circumstances occur in the case of *Lady Dalhousie* v. *M'Douall;* but as they do in that of *Munro* v. *Munro*, it will be convenient to consider the whole of the proposition, and then apply the result to the particular circumstances of each case.

To whatever principle the law of legitimation by subsequent marriage be attributed, there can be no doubt of the generality of the rule where the parents were capable of contracting marriage at the birth or conception of the child. Wherever, therefore, a marriage follows the birth of children procreated of the parties to the marriage, all the requisites concur which are required by the terms in which the rule is laid down, assuming always that the circumstances are such as to bring the case within the operation of the law of Scotland; and as the laws of every country generally affect all those who have their domicile in such country, it would appear that, in order to bring any particular case within this rule of the law of Scotland, it could only be necessary to show that the domicile of the parties was Scotch.

[872] The consideration is of much importance in a case in which it is said that no precedent can be found in which the particular facts of this case occurred; because if the case falls within the terms of the general rule, such rule must govern it, unless it can be shown that there is principle or authority for making it an exception to the general rule, and withdrawing it from its operation.

The two circumstances relied upon for that purpose are, first, that the child was born out of Scotland; and secondly, that the marriage took place out of Scotland. If it should appear that neither of these circumstances would, by itself, take the case out of the general rule, the union of the two cannot have that effect. It can hardly be contended that the country in which the marriage takes place is material: it has never been considered material by the writers upon civil law, nor so treated in the decisions of the Courts. In De Conty's case (Guessiere, tom. 2, b. 7, c. 7), the marriage, although it took place in England, conferred legitimacy on a child whose domicile of origin was in France. The law of the country where the marriage is celebrated ascertained its validity; the law of the country of the domicile regulated its civil consequences. But if the place of the marriage be not material, still less can the place of the birth be so considered. The law of Scotland assumes that what in that country is considered as equivalent to a marriage, took place before the birth or conception of the child. If that be assumed, how can it be material in what country

the child was born? This assumption is adopted for the purpose of legitimatising the issue: why is it to be abandoned when it is peculiarly ne-[873]-cessary for that purpose? If a domiciled Scotchman be in the habit, for business or pleasure, of passing part of his time beyond the border, and some of his children are born within and some without the limits of Scotland, can it be the law that a subsequent marriage should legitimatise some only of his children, and leave the rest illegitimate? It has been assumed in argument, that any of such children, born in a country which allowed legitimation *per subsequens matrimonium* would be legitimate in Scotland, but not if born in England, or in any other country which did not recognise such legitimation. This argument is founded upon the supposed indelibility of bastardy, and seems to have its origin in the circumstance of some very learned persons having used expressions applicable to English law upon a question of purely Scotch law. If English parents have a child born in another country, could the legitimacy of such child in England be affected by any law of such country? The effect of a Scotch marriage must be judged of with reference to Scotch law, and that law not only does not admit the doctrine of the indelibility of bastardy, but on the contrary holds that no bastardy is indelible, unless the parents were at the time of the birth incapable of marrying. If, therefore, the law of England be imported into the consideration, the effect of the Scotch marriage is judged of, not by the law of Scotland but by the law of England.

In this view of the law of Scotland, all the learned Judges of the Court of Session, with the single exception of the Lord President, concurred; and he founded his dissent upon the rule of the law of England as to the indelibility of bastardy, and upon expressions of English lawyers. But he adds, "in the case of *Rose* v. *Ross*, I stated in my opinion that I would not take [874] the law from such an extreme case as that of a woman taken suddenly, and perhaps prematurely, in labour, whilst travelling in England with or without her paramour, and brought to bed of a bastard there and then; returning with it on her recovery to Scotland. That is an extreme case; and what might be the law as to it, we must endeavour to settle when the case occurs." Beyond all doubt, a child so born would be affected with indelible bastardy in England; and if that is to regulate his status in Scotland, the peculiar circumstances referred to would not make an exception in his favour.

For these reasons, and upon these authorities, if the question were to be decided upon the general principles of the civil law, or upon the law as established in Scotland, there would not, I think, be any difficulty in coming to the conclusion that the child of a Scotchman, though born in England, would become legitimate for all civil purposes in Scotland, by a subsequent marriage of the parents in England, if the domicile of the father was, and continued throughout to be Scotch. It remains to be inquired whether there are authorities against such a conclusion.

In *Shedden* v. *Patrick* (Dict. Decis. "Foreign," App. n. 6, 1 July 1803) the question did not arise, because the father was there held to be domiciled in America. In that case, therefore, there was wanting that only circumstance upon which rests the title of the child to claim the benefit of the laws of Scotland.

In *Strathmore* v. *Bowes* (4 Wils. and Shaw. App. 89), if it was not assumed that the domicile of the father was English, it certainly does not appear to have been proved to be Scotch; Lord Eldon saying the domicile was princi-[875]-pally in England; but the decision seems to have turned upon this, that the claim was to a British peerage. Whatever expressions may have fallen from Lord Redesdale, for none can be quoted as coming from Lord Eldon, the decision of that case cannot be quoted as an authority in a case respecting Scotch property, in which the domicile of the father was Scotch.

In *Rose* v. *Ross* (16 July 1830; 4 Wils. and Shaw, 289), the domicile of the father was English. Lord Lyndhurst stated, as the ground of his opinion, that although the marriage was in Scotland, it was a marriage of persons having an English domicile, and coming into Scotland for the purpose of the marriage only. If this case proves anything bearing upon the present, it is that it is not the place of the marriage, but the domicile of the parties married, which regulates the civil consequences of the marriage.

For the same purpose, and for that only, the case of *Warrender* v. *Warrender* (*Ante*, Vol. II. p. 488) has application to the present, because in that case it was as-

sumed, and I think correctly, that for civil purposes in Scotland, a marriage in England of a domiciled Scotchman was to be considered as a Scotch marriage.

These decisions, therefore, do not establish any principle or lay down any rule inconsistent with the proposition that the child of a Scotchman, though born in England, becomes legitimate for all civil purposes in Scotland, by the subsequent marriage of the parents in England, if the domicile of the father was, and continued throughout to be Scotch. If this be the rule of law in Scotland, it embraces the case of *Munro* v. *Munro*, and therefore includes that of *Lady* [876] *Dalhousie* v. *M'Douall*, and renders it unnecessary to consider some of the minor points discussed; such as whether the mother had or had not lost her Scotch domicile, and whether the fact of the conception having been in Scotland might not of itself have led to a decision in favour of the legitimacy. In both cases the question of fact remains to be considered, namely, what was the domicile of the father. In both cases the domicile of the father was originally Scotch; and the question is whether, in either instance, he had at the time of the marriage lost this domicile of origin.

Questions of domicile are frequently attended with great difficulty; and as the circumstances which give rise to such questions are necessarily very various, it is of the utmost importance not to depart from any principles which have been established relative to such questions, particularly if such principles be adopted, not only by the laws of England, but generally by the laws of other countries. It is, I conceive, one of those principles that the domicile of origin must prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile, and acquiring another as his sole domicile. Such, after the fullest consideration of the authorities, was the principle laid down by Lord Alvanley, in *Somerville* v. *Somerville* (5 Ves. 787), and from which I see no reason for dissenting. So firmly indeed did the civil law consider the domicile of origin to adhere, that it holds that if it be actually abandoned, and a domicile acquired, but that again abandoned, and no new one acquired in its place, the domicile of origin revives. [877] To effect this abandonment of the domicile of origin, and substitute another in its place, it required *le concours de la volonté et du fait; animo et facto;* that is, the choice of a place; actual residence in the place then chosen; and that it should be the principal and permanent residence; the spot where he had placed *larem rerumque ac fortunarum suarum summam;* in fact there must be both residence and intention. Residence alone has no effect *per se*, though it may be most important as a ground from which to infer intention. Mr. Burge, in his excellent work (1 Comm. Col. and For. Laws, 54), cites many authorities from the civilians to establish this proposition. It is not, he says, by purchasing and occupying a house or furnishing it, or vesting a part of his capital there, nor by residence alone, that domicile is acquired, but it must be residence with the intention that it should be permanent. In allegations depending upon intention, difficulties may arise in coming to a conclusion upon the facts of any particular case, but those difficulties will be much diminished by keeping steadily in view the principle which ought to guide the decision as to the application of the facts.

If, then, it be the rule of law of Scotland that the domicile of origin must prevail, unless it be proved that the party has acquired another by residence, coupled with an intention of making that his sole residence and abandoning his domicile of origin, —I cannot think that there will be much difficulty in coming to a satisfactory conclusion upon examining the evidence in these cases with reference to this rule. In the case of *Lady Dalhousie* v. *M'Douall*, there is really no difficulty at all. There is nothing in that case which can raise a question as to the father [878] having abandoned his Scotch domicile. In the case of *Munro* v. *Munro* the difficulty is apparently greater, because there was a residence in England of many years; but the only period to be considered is from the father quitting Scotland in 1794, to the time of the marriage, 1801. There was a sufficient reason, independently of any intention of changing his domicile, for his leaving Scotland in 1794. His family house was not in a fit state for residence, and he had failed in effecting a proposed arrangement with his mother by which he wished to obtain for his own use the house where she lived. There is no ground for supposing that he at that time intended to abandon Scotland; the reverse is proved by the first letter he wrote after his arrival in London (3d of September 1794), in which he gives directions about keeping some land in grass,

the only farming he takes pleasure in, and about clothes presses for his dressing-room in Fowlis. In November 1794 he occupied the office of deputy-lieutenant of Ross-shire. In 1795, on the 9th of February, he gave directions for the preparations of a will in the Scotch form; and in a letter of the 14th of June, he states his intention of being in Ross-shire at the end of the month, which by subsequent letters it appears was prevented by an attack of illness. He, in a letter of the 1st of September 1795, expresses his regret at having been prevented going to Scotland; and in a letter of the 14th of September, he says he shall be there early next summer; and in a letter of the 18th, he says that he shall, after Whitsuntide next, take the management of his estate into his own hands. Similar expressions occur in many letters of 1795 and 1796. In a letter of the 7th of October 1796, he says, "I shall be in Ross-shire next year, and should unforeseen **[879]** events oblige me to defer my journey," etc.; and in a letter of the 27th of October, he directs the payment in kind of hens and eggs to be continued, saying, "when at home I shall have occasion for them." Many letters in 1797 speak of his intended journey to Scotland; and in one of the 25th of November 1797, he says, "my journey to Ross-shire, so long and often retarded by circumstances which I could not foresee, is now, by the advice of my friends here, given up till next summer."

It appears that before this time, that is, in 1794 or 1795, the connexion between the Appellant's father and mother had been formed, and she was born in September 1796, which may well account for the continued postponements of his intended journey to Scotland; but he does not appear ever to have abandoned the intention; for in a letter of the 28th of March 1798, to a person in Scotland, he says that he expects very soon to be able to write him the time at which he proposed himself the pleasure of seeing him. In 1799, 1800, and 1801, he gives directions for the fitting up of his family residence in Scotland, and for that purpose sends large quantities of furniture from London; and in September 1801 he marries the Appellant's mother, and by letter of the same year speaks of his intention of coming to Scotland. In a letter of the 15th of April 1802, he says, "I have resolved to be at Fowlis as soon as the house, which is painting and papering, can be inhabited; but as these things do not depend upon my wishes, I cannot fix positively any time. I hope to be in Edinburgh in July or August." He accordingly went to Scotland that year with his family, and resided in his family house at Fowlis, and there continued till 1808, the Appellant's mother having died **[880]** there in 1803. Lord Corehouse, who entered much into this part of the case, in commenting on this correspondence, asked this question: "Do these expressions, when read in connexion with the context, import that he was to return to Scotland, with a view to settle permanently there, and to live at the castle of Fowlis during the rest of his life? The very reverse is manifest." And then he observes upon expressions used, indicating that the promised visit to Scotland would be short. Those observations would be highly important if the question was, whether by his subsequent residence in Scotland he had acquired a new domicile there; but they do not appear to me to touch the question whether he had abandoned the domicile of origin in that country, which can only be effected by evidence of an intention to do so, accompanying the act of a residence elsewhere. If he even formed such an intention, to what period is the adoption of that resolution to be referred? in order to be of any effect upon the present question, it would be at some time prior to September 1801, the date of the marriage.

That he took a lease of the house in Gloucester-place, and formed an establishment there, has been much relied upon, and, in the absence of better evidence of intention as to his future domicile, might be important as affording evidence of such intention, but cannot be of any avail when from the correspondence the best means are afforded of ascertaining what his real intentions were. The having a house and an establishment in London is perfectly consistent with a domicile in Scotland. This fact existed in *Somerville* v. *Somerville*, and in *Warrender* v. *Warrender*. Taking, therefore, the rule of law as to the domicile of origin to be what I have before stated, and applying the **[881]** evidence to that rule, I do not find it proved that the Appellant's father acquired a new domicile in England with the intention of making that his sole residence, and abandoning his domicile of origin in Scotland.

If that be a correct conclusion from the evidence, it follows that the Appellant in *Munro* v. *Munro*, being the child of a domiciled Scotchman, had, at the moment of her

birth, a capacity of being legitimated by the subsequent marriage of her parents for all civil purposes in Scotland, and that she accordingly, by the subsequent marriage in 1801, became legitimate, and as such capable of succeeding to the property in question.

The consequences of the opinions I have expressed are these:—I propose to your Lordships to affirm the interlocutor appealed from in *Lady Dalhousie* v. *M'Douall*, with costs; and to reverse the interlocutor appealed from in *Munro* v. *Munro*, and to remit the cause back to the Court of Session, with a declaration that the pursuer (the Appellant) is the lawful daughter of Sir Hugh Munro.

Lord Brougham:—My Lords, I had not the good fortune to be present when this case was argued; and therefore, were it an ordinary case, I should not have expressed any opinion whatever. Nevertheless, from the part I have so frequently taken in cases of this kind, a reference to which has been made in disposing of the present case, both in the Court below and by my noble and learned friend in delivering judgment here, I think it right that I should not suffer the decision of the House to be come to without saying a few words.

There are two questions for the consideration of [882] your Lordships, as there were for the consideration of the Court below. The first is, whether, supposing the domicile of the parties at the time of the marriage to have been in Scotland, that marriage had the effect of legitimatising issue born in England before the marriage; with reference to the question raised before the Scotch Court as to the title of the party to be considered an heir of tailzie to a Scotch real estate, *quasi* an estate tail, as one of the children of the heir of entail then in possession of that estate. The next question is, whether the domicile was English or Scotch.

My Lords, on the first of those two questions it is, no doubt, fit to observe that this is at present for the first time undergoing decision. It has frequently been mooted in argument by text writers, in discussions at the bar, and occasionally by learned Judges arguing on the Bench, but up to this time no decision has ever been made either in Scotland or here upon the point; namely, whether legitimisation is effected by the subsequent marriage of the parents of a child born out of wedlock, that child being born in a country, and that marriage being celebrated in a country, where no such law holds, but the parties, though being in that country, yet, of course, at the time of the marriage being domiciled in Scotland, where the question arises touching the succession to real estate situated in Scotland. That question is now about to be decided for the first time one way, having been disposed of in Scotland upon the fact only the other way; because, as I shall presently observe, and it is with great satisfaction I state it, the great majority of the learned Judges in the Court below, who dealt with the question of law, came to the same conclusion as that to which I trust your Lordships, on the recommenda-[883]-tion of my noble and learned friend, are now about to come; but they did not feel themselves called upon to decide the case on that point. It is needless to add that this decision does not run counter to the previous authorities, but, as far as any previous decision approaches the present case, all the weight of authority is in favour of the judgment.

I have now to remind your Lordships of the weight of judicial authority in the Court below upon this question; in order that it may be by no means supposed that, because your Lordships are reversing this judgment, you are laying down principles of law contrary to the opinion of the learned Judges from whose decision the appeal comes.

The five learned Judges who formed the majority whose decision you are about to reverse, but to reverse on the ground of fact: those five learned Judges, in the first part of their statement, seem rather to save the question. They seem not to dispose of the question, but give afterwards a very plain opinion in the affirmative: I mean the Lord Justice Clerk, and the other four who agreed with him. They state the difficulties which they think exist, in the first place, on the supposition of Sir Hugh being a domiciled Scotchman: "Even upon this supposition, however, we think the pursuer must have had difficulties to encounter which have not yet been resolved by any clear authority in the law of either country. Some of the *dicta* in the ultimate decision of the cases of Shedden, of Strathmore, and of Ross, seem to point to a conclusion against her; while others of the very highest authority, in the more recent case of Sir George Warrender, have rather a contrary bearing. But holding, as we

do, that the domicile of the husband was also English, we humbly conceive that there is no autho-[884]-rity on which the claim of the pursuer can be supported." Had it stopped there, I should have said, as I did some time ago, that their Lordships being of opinion that the fact of the Scotch domicile was not established, they had no occasion to dispose of the question of law at all, as the question of law did not arise unless the fact of the Scotch domicile was proved: but what follows seems clearly to intimate that those learned Judges were of the same opinion upon the point of law with the majority, though they differed from them in point of fact; for they say, "The law, therefore, under which they themselves intended to live as married persons, may very well be allowed to settle the extent of their rights and duties as with each other, but cannot affect the condition of children previously born, which we think must be determined by the law of the country where the parents were domiciled at the birth and the marriage. If the domicile was not the same for both parents at these two periods, we should hold that that of the father at the time of the marriage should give the rule. But as they were the same in this case, the question does not arise:" thus agreeing clearly upon the point of law with the majority of the learned Judges, though they differed in point of fact. They all agreed, with the exception of the learned Lord President. Lord Corehouse, who differed upon the question of fact, delivered a very clear judgment upon the point of law; but, with the exception of the learned Lord President, all the Judges of the Court below held that the subsequent marriage of the parents would legitimate the issue before marriage, provided the parties were domiciled at the time of the marriage in a country the law of which recognises legitimation *per subsequens matrimonium*.

My Lords, the learned Lord President has given a [885] very able, and in my opinion a very striking judgment, particularly striking from that manly straightforwardness which characterises all the judgments of that right honourable and learned Judge. He has applied himself to the question, and has entered into an argument which had a very considerable effect on my mind when I first came to read it; and if I had not looked very carefully into the authorities to which he refers, I should have found great difficulty in differing from his Lordship as to the conclusion at which he arrives; but when I look at those cases which have been shortly referred to by my noble and learned friend, *Shedden* v. *Patrick*, the Strathmore case, and *Rose* v. *Ross*, I really cannot see how they are to be taken as laying down the rule upon which the Lord President founded his judgment, namely, a status indelible through life being affixed upon the party by the law of the country where that party was born, that character being one of indelible illegitimacy if he was born in England, the law of England being against legitimation by subsequent marriage. My noble and learned friend, who unfortunately is not now present, who bore a principal part in the last of those cases, *Rose* v. *Ross* (Lord Lyndhurst), expressly saves the question with respect to the domicile, and says that he gives no opinion upon that part of the case; and the result of what he says plainly is to show that he did not mean to say how it would have been if the domicile had been Scotch, the domicile in that case plainly being English, and the question therefore no more arose there than it would have arisen here had the fact of a Scotch domicile failed the pursuer; but the majority of the learned Judges were agreed in the early part of their judgment that it did not arise at all. I am [886] upon the whole of opinion that he must adopt the authority of these cases, or the *dicta* of these cases. It is chiefly perhaps what is said by Lord Redesdale, which may not be very accurately reported, which, after all, is only a *dictum*, and not necessary for the decision of the case; it is chiefly on one or two *dicta*, or supposed *dicta*, of that noble and most learned Judge, to whose *dicta* the greatest respect is due, and not certainly upon anything decided, that the Lord President founds his arguments.

My Lords, with respect to the case of *Warrender* v. *Warrender*, undoubtedly as far as that case goes it is in favour of the legitimacy here, because the domicile of the parties there was clearly held to be Scotch. An attempt was made to show that Lady Warrender's domicile was not Scotch, with a view to another branch of the argument, but we all agreed here that her domicile was the domicile of her husband, and that both parties had a Scotch domicile; and we held the marriage in terms, and certainly in substance, to be in the nature of a Scotch marriage, though locally contracted in England. But though the case of *Warrender* v. *Warrender* might have rested entirely,

and in my opinion safely, upon that position, of the parties having a Scotch domicile, yet that case, properly speaking, did not depend entirely on the Scotch domicile, as regarded the nature of the marriage, whether dissoluble or indissoluble. Upon the Scotch domicile, as regarded the jurisdiction of the Court, no doubt it must have rested; in order to give jurisdiction at all there must have been some domicile; but as regarded the domicile at the time of the marriage, that case did not rest entirely, or anything like entirely, on the domicile of the parties being Scotch, or on its being, if you will, a Scotch marriage; because both [887] myself and my noble and learned friend who concurred in that decision, were clearly of opinion that, though the parties had been domiciled in England, that though it had been precisely Lolley's case, namely, an English marriage between English parties who never before in their lives had crossed the Tweed, and though in that case, by the rule in Lolley's case, a divorce in Scotland of that marriage would have been impotent to dissolve it for all English purposes, including the right of the parties after the supposed dissolution to re-marry, as they would still have been guilty of bigamy in England, yet, that in Scotland, for Scotch purposes, the divorce would have been valid to dissolve the *vinculum* of the English marriage as far as regarded all Scotch rights and all Scotch considerations. That was the clear opinion both of Lord Lyndhurst and myself; the only difference between our opinions was, that I went a step further, and held that Lolley's case was wrongly decided even with respect to England; but neither he nor I entertained any doubt that Lolley's case did not and would not affect the law of Scotland, and that the decision was good under the law of Scotland, independently and in spite of the decision in Lolley's case, and without at all by possibility breaking in upon Lolley's case, any more than Lolley's case could break in upon that. And in *Warrender* v. *Warrender*, although the parties held an English domicile, and the lady had never before crossed the Tweed, there was a jurisdiction in the Scotch Court to deal with the question of marriage, and the decree by that Court would have been valid, notwithstanding the English domicile; and if your Lordships will only attend to the manner in which my noble and learned friend dealt with the whole of that question, which he went very elaborately [888] through, you will see that there cannot be the least doubt upon what the effect of the decision was.

I have here in passing to make an observation which I am sorry to say is somewhat in the nature of a complaint. Lord Eldon used often to complain in like manner. I do not go quite so far as he did when he said that no Court was treated in such a way as this Court, the highest Court of all, was; but he certainly had a good right to complain of the manner in which what passed in this Court was taken not always from the most accurate report of what was said. In the course of this session I have had more than once occasion to observe this, but I have never seen it so strikingly as in the present instance; because here are what are called the speeches of Lord Lyndhurst and myself in the Warrender case, given and printed in the case before your Lordships, from an extremely inaccurate note. I do not mean that the short-hand writer is not accurate; quite the reverse; but I mean that in his note on the present occasion, as must needs sometimes happen when a person takes a note of a judgment when it is read, and when it is much more rapidly delivered than it is spoken, there are very considerable inaccuracies either in taking the note or in having it transcribed. Those inaccuracies are perfectly evident to any who reads the sentences in which they occur; the words are not sensible in many instances, and in other instances there are wrong dates and wrong statements, statements very much the reverse of what were made, and in one or two instances affecting the substance and the import of the judgment. Now what I complain of is this: not at all that parties are very impatient to get a report of what passes here in their cause; that is very natural, and they may get it where they please, and get it more or [889] less accurate: but what I complain of is, that after the lapse of a couple of years they should have printed those short-hand writers' notes in these cases, and that then, after the lapse of a year or two, those short-hand notes should be made the foundation of remarks and of arguments in the Court below, when a perfectly accurate and corrected report, compared with the original, had been printed and published by professional gentlemen in the reports of decisions of this House. One should have thought the natural course was to have taken the decision of the case from Messrs. Shaw and Dunlop's report, and not from the note which from some cause contained these inaccuracies: but instead of that, the

Court below act upon the note in the printed cases, which is inaccurate; and then, in your Lordships' House, the note is served up as part of the Appendix, and not the note as taken, which it might have been easily, from the printed reports of the gentlemen who at that time reported the decisions of your Lordships' House. Nevertheless, even here I find that Lord Lyndhurst says, "It is a connexion" (marriage) "recognised in all Christian countries, and they say" (the Courts below, the Scotch Courts, say), "and I think they say with propriety, We are not prevented from pronouncing sentence of divorce *à vinculo matrimonii* in this country, if the parties are domiciled here, merely because a remedy to the same extent is not given in other countries, particularly where the marriage is celebrated." That is as to the question of the dissoluble or the indissoluble nature of the marriage; and then he goes on to remark upon the whole of the cases in regular succession in the Scotch Courts, and to show that the Scotch Courts have uniformly until the time of Lolley's case (which is a fact) exercised this jurisdiction, and dissolved English mar-**[890]**-riages, marriages between English parties having no Scotch domicile, or pretence of a Scotch domicile; and that then a doubt for the first time existing, that doubt influenced the decision in the case of *Edmiston* v. *Edmiston;* and afterwards the whole fifteen Judges, differing from the Commissary, who had been influenced by the decision in Lolley's case, set that matter right by reversing the decision of the Commissary, and held that which has been the law ever since, that, without reference to domicile at all, the Scotch Courts have a right to dissolve an English mariage between English parties then resident in Scotland, though the parties had never before any domicile whatever in Scotland; and that, in Scotland, to all intents and purposes that divorce is good and valid.

My Lords, thus much I thought it right to say in consequence of one or two observations that were made upon the case of *Warrender* v. *Warrender* in the Court below; not denying that, so far as that case goes, it is a decision at once in favour of the principle upon which the point in the present case turns, though certainly it cannot be said to be a decision, or anything like a decision, upon the point itself.

My Lords, the other question is a question of fact; namely, with respect to the domicile of the parties at the time of the marriage. I have not had the advantage which my noble and learned friend enjoyed of hearing that question argued at the bar. I have nevertheless gone through the whole of this case, which appears to lie in a much less narrow compass as regards facts than might be supposed, in consequence of the introduction of a good deal of matter which does not appear quite relevant, and of a great deal of other discussion that perhaps was not perfectly essential to the case (though very able); but nevertheless there is **[891]** abundant evidence to settle this question fully in my humble apprehension, and to settle it against the decision of the Court below.

The whole question appears to me to turn upon what took place between the year 1794 and the year 1801, when the marriage took place. The party, Sir Hugh Munro, left Scotland, where it is not denied he had resided previous to that time. In the year 1794 he left Scotland, in consequence of some difference with his mother, and came to London: he there formed a connexion which ended in a marriage in September 1801. But previously to that marriage, namely, on the 16th of May 1796, the pursuer was born, the child of that connexion. Now up to 1794 it is perfectly clear that the domicile was Scotch, and it appears to be agreed on all hands that the rules which Sir William Grant, then Master of the Rolls, extracted, as he said, from various decisions, the Annandale case, *Bruce* v. *Bruce*, and other cases, to all of which your Lordships have been referred, were correct rules. The third of those rules which he extracted from decisions is very material in the present instance, and seems undeniable as the rule of the Scotch, as well as of the English Courts; and I apprehend it is the rule universally that, where a domicile has been constituted, the proof of the change of domicile is thrown upon the party who disputes it, and that you must show distinctly that there has been the *animus* as well as the *factum;* that there has been a desire and intention to change the domicile, as well as the fact of leaving that place of residence, in order to alter the former domicile and to acquire a new one. Now, my Lords, looking at the facts here, I do not think that they amount to anything sufficient to support the conclusion of a change of domicile. The mere taking of the lease, as some of the learned **[892]** Judges well observed in the Courts below, is explained,

and much that otherwise would not be so well understood is explained by the same circumstance; I mean, by the connexion which the party had formed with the mother of the pursuer. That he had a constant intention of returning is certain; and I do not go merely upon the words he uses in the correspondence, when he talks of returning, because that might only mean going back to the place from which he had come; but it is the whole disposition of his mind; that which appears to me through this correspondence shows that it was the fixed intention of Sir Hugh Munro to consider Scotland still as the place of his residence, and that his being in London or any part of England was occasional rather than permanent.

My Lords, for the reason which I have given, namely, that I had not the advantage of being present during the argument, I shall not enter into the consideration of the question of fact further than to say that upon looking at the whole of this case with very great care, under the pressure of that anxiety which one naturally feels not only upon a question of such great importance to the parties, but upon a question where it was likely that the inclination of one's opinion should be against the judgment of the Court below, I certainly have come to the same conclusion with my noble and learned friend. Admitting that there may be some doubt—admitting that there may be some conflict in the circumstantial evidence upon which that case must rest—admitting that there is considerable force in several of the arguments of the learned Lord, Lord Corehouse, who agrees with the majority of the Judges as to the law, but differs from my noble and learned friend himself, on the fact of domicile; yet still those objections are, in my opinion, sufficiently **[893]** answered, and those doubts sufficiently explained, by the considerations which arise from the rest of the evidence, and from the peculiarity of the circumstances in which these parties were placed; and I think that upon the whole your Lordships are entitled, or rather are called upon, to consider that at the period of the marriage the Scotch domicile had not been changed, and that the parties were domiciled as Scotch parties at the time when the contract took place. The consequence of this will be, that if your Lordships adopt the opinion of my noble and learned friend upon the subject, upon those two points you will concur in the question of law with almost the whole of the learned Judges; that you will upon that question give no decision which in the least breaks in upon any former decision; on the contrary, you will give a decision which is in concurrence with the principle of the former cases which approach the nearest to the present; and that you will give a judgment, in my humble apprehension, which is consistent with all the principles of the law governing such matters: and that upon the question of fact alone, you are called upon to differ from the Judges of the Court below, differing also, it may be observed, from a very narrow majority of the Judges; for whereas six were of opinion that the domicile was Scotch, seven only were of opinion it was not. Agreeing, as I have said, with almost the whole of them upon the question of law, and upon the question of fact differing with those Judges in the very narrow majority of one, your Lordships will, I trust, agree with my noble and learned friend in a decision reversing the decision of the Court below. I have already referred to the terms of the decision. I apprehend that the decision to be given upon this case is not a judgment absolutely and generally finding that **[894]** the party is legitimate, but it is a judgment finding, according to the conclusions of the libel which proceeds upon the statements of the facts, that she ought to be found and declared as lawful daughter, entitled under the will as next heir of entail. It is rather a finding of her having the right, as heir of entail *quasi* lawful daughter, than in terms or in fact a distinct judgment affirming the legitimacy: it is rather a judgment that she is heir of entail, notwithstanding what happened as to her being born before the marriage, than a distinct judgment that she is legitimate; and it is so, taking into account that, in construing the Scotch law, "legitimate" may mean legitimate *per subsequens matrimonium*.

In the *Countess of Dalhousie* v. *M'Douall*, the interlocutor was affirmed with costs.

In *Munro* v. *Munro*, the interlocutor was reversed, and the cause remitted, with the declaration advised by the Lord Chancellor.